

UNITED STATES DISTRICT COURT
THE DISTRICT OF MASSACHUSETTS

REV. FR. EMMANUEL LEMELSON a/k/a
GREGORY M. LEMELSON,

Plaintiff,

v.

JASON D. LEMELSON,

Defendant.

No. 4:15-cv-40082-TSH

HEARING REQUESTED

MOTION BY DEFENDANT JASON D. LEMELSON TO DISMISS COMPLAINT

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”), Defendant Jason D. Lemelson (“Defendant”), respectfully moves the Court for an order dismissing Plaintiff’s complaint (“Complaint”) with prejudice. The Complaint fails to state claims against Defendant and should be dismissed with prejudice for the following reasons:

First, the Court should dismiss Plaintiff’s breach of contract, breach of the covenant of good faith and fair dealing, and quantum meruit/unjust enrichment claims (Counts I through III) because Massachusetts law prohibits Plaintiff from receiving compensation for investment advice and/or management services provided to Defendant because Plaintiff was not registered as an investment advisor or investment advisor representative and the alleged compensation contract was not in writing.

Second, the Court should dismiss Plaintiff’s breach of contract claim (Count I) because Plaintiff has failed to allege acceptance and/or mutual assent as to a key contract term—the amount of (or formula for determining) compensation.

Third, the Court should dismiss Plaintiff’s breach of the covenant of good faith and fair dealing claim (Count II) because (1) there is no valid and enforceable contract

and (2) this claim is unavailable where, as here, the alleged breach is merely the failure to perform, and there is no allegation of improper motive or “pretextual or coercive” behavior.

Fourth, the Court should dismiss Plaintiff’s quantum meruit/unjust enrichment claim (Count III) because (1) Plaintiff did not reasonably expect payment and (2) no reasonable person in Defendant’s position would have expected to pay Plaintiff a 50% performance fee.

Last, the Court should dismiss Plaintiff’s breach of fiduciary duty claim (Count IV) because (1) Plaintiff does not allege a partnership; (2) even if a partnership had been established, Defendant did not owe a fiduciary duty to Plaintiff not to dissolve the purported partnership; (3) even if a partnership had been established, Defendant did not owe a fiduciary duty to Plaintiff not to make the alleged misrepresentations years after the purported partnership had been dissolved; and (4) Defendant (as a putative client) did not owe Plaintiff (who was acting as an unregistered investment advisor) a fiduciary duty to pay compensation for services rendered.

Accordingly, and as set forth in further detail in Defendant’s supporting memorandum of law, filed contemporaneously herewith, Plaintiff’s Complaint against Defendant should be dismissed with prejudice.

WHEREFORE, Defendant Jason D. Lemelson respectfully requests that the Court: (1) grant his motion, dismissing the Complaint against him in its entirety with prejudice and entering judgment for Defendant; (2) award Defendant his reasonable attorneys’ fees and costs incurred in having to make this motion and defend against this action generally; and (3) grant such other relief as the Court deems just and equitable.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(d), Defendant respectfully requests that the Court hear oral argument on this Motion.

LOCAL RULE 7.1(A)(2) CERTIFICATION

Pursuant to Local Rule 7.1(a)(2), I, Philip M. Guess, counsel for Defendant, certify that I conferred with counsel for Plaintiff on July 9, 2015, regarding the issues presented by this motion. Counsel for Plaintiff indicated that he would oppose the motion.

Dated: July 14, 2015

s/ Philip M. Guess

Philip M. Guess

Respectfully submitted,

JASON D. LEMELSON

By his attorneys:

s/ Philip M. Guess

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Dated: July 14, 2015

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on this 14th day of July, 2015.

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s/ Philip M. Guess (pro hac vice)